UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

CC-1 LIMITED PARTNERSHIP D/B/A COCA -COLA PUERTO RICO BOTTLERS

Respondent Employer

and

Cases 24-CA-11018 et al.

CARLOS RIVERA, et al.

Charging Parties

and

UNION DE TRONQUISTAS DE PUERTO RICO, LOCAL 901 INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Respondent Union

and

Cases 24-CB- 2648, et al.

CARLOS RIVERA, et als.

Charging Parties

and

MIGDALIA MAGRIS, MARITZA QUIARA, SILVIA RIVERA, JESUS BAEZ, HUMBERTO MIRANDA, ORLANDO HERNÁNDEZ AND RAYMOND REYES

Cases 24-CB- 2706, et al.

Charging Parties

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT UNION'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT UNION'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Comes now Counsel for the Acting General Counsel (herein CGC) and respectfully submits the Honorable Board, Acting General Counsel's Answering Brief to the Respondent Union's Exceptions to the Administrative Law Judge Decision (herein ALJD).

Counsel for the Acting General Counsel has already submitted its Exceptions to the Administrative Law Judge's Decision and Brief in Support Thereof. While the same adequately addresses some of the issues raised by Respondent Union's Exceptions, CGC submits this supplemented brief as follows:

I. THE EXCEPTIONS

Respondent Union filed 10 exceptions to the ALJD, in this regard, it should be noted that exception II pertain to the CA portion of the Cases, thus, such exception was discussed in more detail in CGC's Exceptions and Brief in Support Thereof, and CGC's Answering Brief to Respondent Employer's Exceptions. Notwithstanding the above, CGC will jointly address Respondent Union's Exceptions I through X.

II. DISCUSSION[1]

a. Background

Maritza Quiara and Migdalia Magriz are employees of Crowley Liner Services (Crowley). (GC. Ex. 34, item 1) Crowley employees are represented by Union de Tronquistas, Local 901, International Brotherhood of Teamsters (IBT), herein Respondent Union or Union. Silvia Rivera is an employee of Pepsi Cola International (Pepsi). (GC. Ex. 34, item 2) Pepsi employees are also represented by the Union. Quiara and Magriz were shop stewards for the Union at the Crowley shop until March 12, 2009. Rivera was the general shop steward for the office employees at Pepsi until March 12, 2009. On January 12, 2009, the Union filed internal charges against Magriz, Quiara and Rivera for their participation in the Coca Cola employees meeting held on October 12, 2008, where a strike vote was ratified, and in the Coca Cola strike held from October 20-

[1] Although, CGC addresses some of the Union's exceptions with specificity, this brief is submitted in opposition to all of the Union's exception, irrespective of whether they are e specifically addressed or not in the brief.

22.[2] On March 10, 2009, the Union imposed disciplinary actions against Magriz, Quiara and Rivera. Such discipline consisted of a $10,000 fine, membership expulsion for six years and removal from their positions as shop stewards.

b. The Internal Union Elections[3]

In 2008, during the Union's internal elections, Quiara, Magriz, and Rivera ran for positions on its Board of Directors, for president and vice-president, and trustee, respectively. (GC. Ex. 34, item 19). They were members of the slate "Tronquistas Haciendo la Diferencia" (Teamsters Making the Difference). This slate was running against the slate presided by Alexis Rodriguez. On October 3, 2008, the elections were held and the slate presided by Rodriguez won. (GC. Ex. 34, item 21) On October 5, 2008, Quiara, Magriz and Rivera unsuccessfully contested the results of the election with the International Brotherhood of Teamsters, "IBT". (GC. Ex. 28, ¶¶ 8-10). Ultimately, on January 20, 2009, they filed a charge before the Department of Labor (DOL) (GC. Ex. 28, ¶ 11). As a result of their charge, the DOL filed a lawsuit on April 7, 2009 before the US District Court of Puerto Rico against the Union after finding irregularities in the election. A rerun election is being requested by the DOL. (GC. Ex. 34, item 23, GC. Ex. 28)

By letters signed February 18, 2009 and again March 12, 2009, the Union agreed to extend until April 3, 2009, and April 10, 2009, respectively, the date the DOL had to bring suit against the Union contesting the internal elections. (GC. Ex. 28, ¶¶ 12 & 13) .

[2] Refer to CGC's Exceptions to the ALJD and Brief in Support thereof for more details.
[3] Union's exception VIII.

c. Disciplinary Actions Against Magriz, Quiara and Rivera.

As noted, the Union disciplined its members Magriz, Quiara and Rivera because they participated in and/or attended the meeting held by the Coca Cola employees on October 12, 2008 (at the Mendoza facility), and also participated in the Coca Cola strike. (GC Ex. 34, item 17; & GC Ex. 27)

It is undisputed that Magriz and Rivera participated in and/or attended said meeting and strike. Regarding Quiara, it is undisputed that she participated in the Coca Cola strike; however, the evidence showed that Quiara did not attend the October 12 meeting because she was hospitalized from October 9, 2008 until October 13, 2008. (GC. Ex. 34, item 45) Even though Quiara did not attend the meeting, the Union took the same disciplinary action against her that it took against Magriz and Rivera (GC. Ex. 27). As noted above, the Union fined Magriz, Quiara and Rivera in an amount of $10,000, expelled them from union membership for a period of six years, and removed them from their position as shop stewards.

The Union stipulated that the disciplinary actions imposed on Magriz, Quiara and Rivera were the only three disciplinary actions the Union had imposed on any of its members in the previous three years. (GC Ex. 34, item 18) On the other hand, even though it did not result in disciplinary actions, it did file internal Union charges against Union members Raymond Reyes, Orlando Hernandez, Humberto Miranda and Jesus Baez for their participation in and/or support for the October 12 meeting and the Coca Cola strike. (GC Ex. 34, item 37) The charges filed against Reyes, Hernandez, Miranda, Baez, Magriz, Quiara and Rivera are the only charges the Union had filed in the previous

three years, all of which are associated with the October 12 meeting and the Coca Cola strike. (GC. Ex. 34, item 7)

It should be noted that Magriz, Quiara, Rivera and Miranda were all members of the slate "Teamsters Making the Difference." Reyes, Hernandez and Baez served as observers for this slate during the internal Union elections. (GC. Ex. 34, items 19 & 38)

d. Failure of the Union to Notify Its Members of Its Decision Not to Support The Strike

The parties stipulated, and the ALJ found, that at no time did any Union official inform Magriz, Quiara, Rivera or any other of its members that were supporting the Coca Cola strike that they could be subject to internal Union discipline for doing so. It was also stipulated that no Union official visited the strike area from October 20 through October 22, 2008, nor communicated to any Union member the Union's position regarding the strike. (GC Ex. 34, items 41-42).

Although the Union sent a letter to the Respondent Employer on October 20, 3008 stating that the strike was not authorized, as noted by the ALJ and stipulated by the Union, there is no evidence that the Union affirmatively took action to notify its members that it had withdrawn its support for the a strike prior thereto or during the strike. In this regard, the record shows that it was the Union that encouraged employees to go on strike. Specifically, on September 15, 2008, Union Secretary-Treasurer German Vazquez obtained a unanimous strike vote from the unit employees. On September 16, 2008, the Union, through Vazquez and Union Representative Jose Adrian Lopez, requested strike funds from the International Union. (CP Union 24-CB-2706 Ex. 1) Thereafter, on October 14, 2008, the IBT authorized strike funds for the Coca Cola employee members. (GC Ex. 34, item 3; GC Ex. 18) As a result, there is no evidence to support a finding that

Magriz, Quiara and Rivera were aware that the Coca Cola strike was not supported by the Union, since strike funds had already been requested and approved. Members were never informed that the Union had changed its position regarding the strike.

e. Unreasonable, Disparate and Discriminatory Application of Discipline

The Union alleges that it disciplined Magriz, Quiara and Rivera because they violated the Union's bylaws, International Constitution and a "broad" Court Order[4] by participating in the October 12 meeting and the October 20-23 strike. (GC Ex. 27) However, the Union admitted that it had knowledge that other members participated in the October 12 meeting and/or in the Coca Cola strike and that it failed to impose any disciplinary action on any of those employees. In this regard, it should be noted that the Union stipulated that it received a document dated October 12, the date of the employees' meeting, with the signatures of most of the Coca Cola unit employees that had participated in the October 12 meeting, and, who were requesting that the Union implement the strike vote obtained on September 15, 2008 and on October 12, 2008. (GC. Ex. 34, item 24; & GC Ex. 29). The Union did not file charges or impose any disciplinary action against any of the employees listed in said document (GC. Ex. 34, item 44),[5] nor against Crowley employees' Brenda Rivera, Daisy Feliciano, Aracelis Borras, Israel Roman, Solesnir Gonzalez and Jose Grajales; or UPS employees Abigail Guzman-Rosario and Hiram Castro, whom the Union had learned, at least by March 2009, had also participated in said meeting. (GC Ex. 34, items 46-47)

[4] A "broad" Order from the United States Court of Appeal for the First Circuit Case 71-1371, requires the Union to take certain affirmative actions prior to authorizing a strike. Specifically, the Union must gather striking employees and read them the broad Order and a Notice to Employees therein, and it must refrain from incurring in acts of violence or coercive conduct.

[5] Exception III.

Regarding the Coca Cola strike itself, it was stipulated that none of the unit employees who had participated in said strike were disciplined by the Union. (GC. Ex. 34, item 43). Nor did the Union impose discipline on UPS employee Edgardo Rivera and Crowley employee Angel Chico, who also participated in the Coca Cola strike. (GC. Ex. 34, items 48-50).

The only employees that were disciplined or that the Union filed charges against were those who were openly involved with the slate "Teamsters Making the Difference" and whom had filed charges in the DOL against the Union.[6]

In addition, it should be noted that the Union occupied a shop steward position with a Union member (Fabian Berrios) that had also participated during the October 12 meeting and whom was not disciplined by the Union. Also, the Union used as witnesses against Magriz, Quiara and Rivera, Union members that participated on the October 12 meeting and/or strike, such as Fabian Berrios, and Ruben Nuñez; again, the Union failed to discipline these members for the same violations that it charged Magriz, Quiara and Rivera. (U. Ex. 11-14, Fabian Berrios, Ruben Nuñez). In this regard, it should be noted that during the hearing Respondent Union's attorney indicated that the Union would have imposed discipline on the Charging Parties even if they had only attended. (Tr. 435)

f. The employees were engaged in activity for mutual aid or protection[7]

In this case, it is clear that the October 20-22 strike was protected activity under Section 7 of the Act. (Refer to CGC's Exceptions and supporting Brief, and Answering

[6] These were disciplined for supporting a strike that had not been authorized by the Union. As noted above, however, at first the Union encouraged the Coca Cola employees to approve a strike vote and then without notifying its members, it withdrew its support for a strike. In this regard, it is interesting to note that at the Coca Cola shop, the slate presided by Union President, Alexis Rodriguez, did not obtain the members' support during the October 3, 2008 internal elections, (GC. Ex. 34, item 22), which may explain why the Union arbitrarily withdrew its support for the strike.

[7] Exceptions II and III.

Brief to Respondent Employer's Exceptions to the ALJD) In addition, it should be noted that even if the discharge of the shop stewards are not found to be an unfair labor practice, a proposition that the CGC vehemently opposes, unit employees were entitled to protest the discharge of their fellow co-workers since the Coca Cola union shop was left without shop stewards. In this regard, it should be noted that it has long been established that a strike or work stoppage to protest the discharge of fellow employees, whether those discharges were justified or unjustified, is concerted activity protected by Section 7 of the Act. See Summit Mining Corporation, 119 NLRB 1668, 1672-73 (1958), and authorities there cited. Auto-Truck Federal Credit Union, 232 NLRB 1024, (1977), Associated Cleaning Consultants, 226 NLRB 1066, (1976), and Roemer Industries, Inc., 205 NLRB 63, (1973). As a result, Respondent Union's allegation that if the October 20-22 strike is not found to be an unfair labor practice strike, it will render the strike to be unlawful, is without merit. It is submitted that, even a finding that the October 20-22 strike was not an unfair labor practice strike; such strike will still be protected under Section 7 of the Act, since employees were protesting the discharges of their co-workers.

Consistently, it is noted that Section 7 provides that "[e]mployees shall have the right... to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Board has explained that "employees making common cause with fellow employees of another employer are engaged in protected concerted activity because, even though the immediate quarrel does not itself concern them, the solidarity thus established assures them, if their 'turn even comes,' of the support of those 'whom they are then

helping.'" Boise Cascade, 300 NLRB 80, 82 (1990), citing NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F 2d 503, 505-506 (2d Cir. 1942).

In Boise Cascade, supra, the Board found that by wearing a pin, the employee was "making common cause" with employees in a sister local in their dispute with their employer.

In Eastex, Inc. v NLRB, 437 US 556 (1978), the Supreme Court held that the definition of "employee" in Sec 2(3) of the Act, "was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own." Id at 564. "[T]he solidarity by aiding another employee's grievance against his employer is mutual aid in the most literal sense." Manpower, 272 NLRB 827 (1984) citing NLRB v Peter Cailler Kohler Chocolates Co., 130 F2d 503, 505-506 (2d Cir. 1942).

Clearly, Quiara and Magriz were engaged in Union and/or concerted protected activities when they attended the October 12 meeting where a vote to strike was re-affirmed should the Respondent Employer not reinstate the discharged shop stewards, as well as when they, together with Rivera, attended and/or participated in the strike itself.

g. Limitation on Union's capacity to discipline its members[8]

There is no question that the employees involved in this case were engaged in concerted activity protected under Section 7 of the Act when they supported the Coca Cola employees in their strike. Thus, the issue here is whether the Union violated Section 8(b)(1)(A) by filing charges against and/or disciplining them for engaging in activity protected under Section 7. The outcome depends on whether the Union's action

[8] Exceptions I, IX, X.

was protected under the proviso of Section 8(b)(1)(A). "[T]he mere fact that the discipline is in reprisal for a Section 7 right is not sufficient to condemn the discipline." Teamsters Local 741 (A.B.F. Freight), 314 NLRB 1107, 1109 (1994). In analyzing the interplay between Section 8(b)(1)(A) and its proviso, the Supreme Court in Scofield v NLRB, 394 US 423 (1969), expressed its analysis of this section of the Act by stating that: a union is free to enforce a properly adopted rule (1) which reflects a legitimate union interest, (2) impairs no policy Congress has imbedded in the labor laws[9], and (3) is reasonably enforced against union members who are free to leave the union and escape the rule.

More recently, in Office Employees Local 251 (Sandia National Laboratories), 331 NLRB 1417, 1418–1419 (2000), the Board articulated its latest approach for reviewing the propriety of union discipline under Section 8(b)(1)(A): "[W]e find that Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct against union members that (1) impacts on the employment relationship, (2) impairs access to the Board's processes, (3) pertain to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or (4) otherwise impairs policies imbedded in the Act. In determining whether an internal union rule is geared to a legitimate union interest or affects a member's employment status, the Board must determine whether enforcement of the rule has an external effect and, thus, tends to restrain or coerce employees in the exercise of their Section 7 rights.

[9] It is well settled that the Board may reach internal union disciplinary actions that run counter to the recognized public policies of the Act. For example, the Board has long held with court approval that the proviso does not shield from condemnation under 8(b)(1)(A), a union's fine of a member for refusing to engage in conduct that would be unlawful under the Act. Similarly, a union may not fine members for filing charges with the Board without exhausting their internal union remedies because such a rule unlawfully restricts its members' access to the Board's processes, in contravention of the important public policy of unfettered access to the Board. Citations omitted.

Citing NLRB v. Boeing Co., 412 US 67, 74, (1973), the Union alleged that the Board has refused to examine the reasonableness of otherwise legally imposed union fines, and has stated that the Supreme Court has held that inquiry by the Board into the multiplicity of factors bearing on the reasonableness issue would necessarily lead the Board to substantial involvement in strictly internal union affairs. However, the case at hands is distinguishable from the one in NLRB v. Boeing Co., supra, as well as it can be distinguishable from the facts of Scofield.

First, in neither of those cases, Boeing Co. or Scofield, was the Supreme Court presented with the question of the reasonableness of the Union's actions when imposing the coercive disciplinary action upon their members. To the contrary, the question therein was whether the amount of the fine was reasonable as to grant the Board jurisdiction. Second, unlike in our case, in both of those cases the Union disciplined all of the members that crossed the picked line. Accordingly, there was no issue before the Supreme Court concerning the Union's disparate treatment or unreasonable enforcement of its rules in the depriving of member's Section 7 rights. Here, although the fines are unreasonable, $10,000, the alleged legitimate policy was unreasonably and disparately applied.

In this regard, it should be noted that in Operating Engineers Local 3 (Specialty Crushing), 331 NLRB 369 (2000), the Board found that the union unlawfully disciplined four members for working with a nonunion employer. In that case, the Board took into consideration the fact that the employees had not been told previously of the union's directive to cease working for a nonunion employer. In addition, the union business agent could not recall any other instance in the past years that union members had been

cited for working nonunion. While the union adduced evidence of only one other instance in the preceding five years in which members were cited for working nonunion, under the facts of the case, the Board found that the union failed to establish that it lawfully disciplined the four union members pursuant to a validly enforced rule. Accordingly, the discipline was not protected under Scofield principles.

In Electrical Workers IBEW Local 1579, 316 NLRB 710 (1995), the Board also found that the Union had unreasonably applied a rule against an employee for working nonunion. In this regard, the Board found a violation based on disparate treatment, since the union imposed the fine solely on an employee who was a traveler and not on its own members who worked for the same nonunion employer. Also, the union failed to institute the disciplinary proceedings against the employees within 60 days from the day it became aware of the alleged violation, thereby violating its own constitutional time limitations.

Here, the Respondent Union has not satisfied the second or the third prong of the Scofield test. First, the prohibition and Union's action impairs a policy firmly embedded in the labor laws; the right to support a strike,[10] to oppose union leadership[11] and to have free access to the DOL. Moreover, as stipulated by the Union, the disciplinary action imposed on Magriz, Quiara, and Rivera, affected their seniority rights. As a result, the

[10] Note that Coca Cola employees were free to engage in strike, even if the strike was not authorized by the Union, since the collective-bargaining agreement had expired. It is well settled that represented employees have the right to engage in unauthorized strikes or "wildcat strikes" if there is no contractual prohibition. See Silver State Disposal Serv., 326 N.L.R.B. 84, (1998).

[11] Although dissident internal union activities are not "classic union activities" in support of a union they are nonetheless protected by the Act. Nationsway Transport Service, 327 NLRB 1033, 1034 (1999). E.g., Wenner Ford Tractor Rentals, Inc., 315 NLRB 964 (1994) (Wright Line applied; discriminatee's conduct in question was his opposition to union officials in an internal union election); Avon Roofing & Sheet Metal Co., 312 NLRB 499, 503 (1993) (Wright Line applied; discriminatees' conduct in question was their dissident internal union activities).

discipline at hand has a meaningful relation to the employment relationship and the policies of the Act, as required in Sandia National, supra. (GC. Ex. 34, item 52)[12]

Secondly, the Union alleges that it sought to prohibit members from participating in unauthorized strikes and/or work stoppages. But the prohibition was not reasonably enforced, as it was not enforced against all Union members who participated in the October 12 meeting or the strike. Thus, the evidence showed that the disciplinary actions were applied disparately against the Union's membership. The evidence also showed that other Union members participated in the October 12, 2008 meeting and strike, whether they were Coca Cola employees or employees of other employers. However, the Union failed to apply any disciplinary action to any of these employees. It is submitted that the Union was obligated to apply the discipline to all members who participated in the meeting and/or strike for it to be considered reasonably applied. Since the Union did not apply discipline to all those members it had knowledge of having participated in the Coca Cola meeting and/or strike, it cannot be said that the Union's actions against Magriz, Quiara and Rivera were reasonable. To the contrary, an unlawful motive can be inferred from the Union's actions and disparate treatment of these members.

In this regard, it should be noted that the Union unlawfully picked and chose to discipline only those members that challenged their leadership and who had filed a complaint with the DOL contesting the validity of the elections held by the Union, election which resulted in the DOL's ruling that the election itself was invalid. It is clear that the Union was aware, by the time it disciplined Magriz, Quiara and Rivera, that the

[12] The Union in its Exceptions to the ALJD, footnote 56, states that the seniority rights in case of lay-off was the only term and condition of employment that was affected, however, such fact or proposition is not supported by the stipulation or the evidence in the record. The Union also stated that as of today, the charging parties had not been affected because of the changes in their seniority status. To the contrary, and as a matter of fact, after the hearing closed charging party Migdalia Magriz was bumped from her position, as a result, her salary was reduced.

DOL was going to bring suit with respect to the aforesaid election, since, by letters dates February 18 and March 12, 2009, the Union agreed to extend the time the DOL had to bring suit contesting the election to April 3 and April 10, 2009, respectively.

Moreover, not only did the Union fail to uniformly apply its rule. Ironically it occupied a shop steward position in the Coca Cola shop, and used as witnesses against Quiara, Magriz and Rivera, Union members that had also participated and/or attended the October 12 meeting and/or October 20-22 strike and whom the Union failed to disciplined despite the fact that the Union argued that it would have disciplined the Charging Parties even if they had only attended such activities (U. Ex. 11-14, Fabian Berrios, Ruben Nuñez, & Tr. 435). This demonstrates that the Union was not enforcing its Bylaws and Constitution, but was instead masquerading its true motivations under the guise of the internal union matter argument, so that it could be able to discriminate against these three members and make sure they will no longer oppose or challenge the Union leadership. Thus, there is no honesty of purpose in the Union's actions.[13]

It cannot be said that the Union's actions were taken to protect a legitimate interest. To the contrary, the evidence showed that the Union unlawfully used the protected concerted activities of these three members as a pretext to perpetrate particular and discriminatorily interests of the Union leadership. Under these circumstances, the balancing weight should favor and protect employees' right over those of the Union.[14]

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[13] The Supreme Court has held that the federal labor laws impose on a union, in acting as an exclusive bargaining representative, a statutory duty to fairly represent all workers in the bargaining unit, which includes the duty to treat all such workers without hostility or discrimination, to exercise its discretion with good faith and honesty, and to avoid arbitrary conduct. Vaca v. Sipes, 386 U.S. 171 (1967). [Emphasis supplied].

[14] CGC submits that the Board should consider as additional proof of unlawful motivation the fact that the Union is advocating in favor of Respondent Employer and against approximately 44 of its own members, by alleging in its exceptions and openly communicating to employees that the October 20-22 strike was

In this regard, it should be noted that the Act was not enacted so Unions could coerce and interfere with its members Section 7 rights when no legitimate Union interest is being protected. If a Union can camouflage its unlawful motivations, such as in this case, under the preposition that it is enforcing its By Laws and Constitutions, in order to deprive the Board from its jurisdiction while it is allowed to coerce its members from engaging in protected activities, then the rights guaranteed to members by Section 8(b)(1)(A) could become ineffective. The sole fact that a Union uses the rights guaranteed by Section 7 to advance their unlawful motivations, such as discrimination and/or arbitrary considerations, should be sufficient to allow the Board to enforce the Act independently of the effect those actions have in the member's employment status. Just as strikers lose the protection of the Act when they engage in misconduct, similarly, it is submitted that Union's should lose the protection of the Act when their actions are driven to protect illegitimate interests outside the scope of the provisions of Section 8(b)(1)(A).

In addition, the Union argued that by the discipline, it is enforcing the Broad Order issued by the United States Court of Appeals for the First Circuit Court against the Union. It also alleges that *"to say that the Union did not have legitimate reasons to assure compliance with the Broad Order and to impose sanctions on the stewards that may have violated it, is sending a wrong message...when the Union has not approved the strike..."*

The Union alleges that it had legitimate reasons to assure compliance with the Broad Order. However, the Union is twisting the requirement of the Broad Order to its own convenience. In this regard, it should be noted that the Union has always stated that

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unlawful, conclusion we contend is for the Board to decide. Cf. Union De Obreros De Cemento Mezclado (Betteroads Asphalt Corp.), 336 N.L.R.B. 972, (2001).

it did not approve the strike, if the Union did not approve the strike, then, it would seem that it should not fear for any violation to the Broad Order, especially since such order only applies when the Union has authorize picketing, strike, or other strike-related activity (J. Ex. 10). In addition, the Broad Order applies to Union officers, agents, and representatives, and as the own Union's By Laws states in section 18.08, shop stewards are not agents of the Union. Conveniently, the Union asserted that section 18.08 applies only to the Internal Union Convention. However, such inference is not supported by the evidence in the record, to that effect, it should be noted that section 18.08 pertains to Article XVIII- Committees, Delegates and Shop Stewards, and does not states that it only applies to Internal Union Conventions.[15] Moreover, if the Union in fact was policing the requirements of such Broad Order it would have taken the affirmative actions, as required by the Broad Order, necessary to bring to an end the strike. Nevertheless, the Union did not notify any of its members that such strike was unauthorized.

The Union argued that if the Board were to find that the Union could not impose sanctions, in essence, it would modify the Broad Order. The Union's argument is a desperate attempt to safeguard its unlawful actions under the language of the Broad Order they ignored during the strike, and that they opportunely tried to enforce five months after the strike ended.[16] The language of the Broad Order is clear; that is, it only applies to Union officers when the Union authorizes a strike or picket line. Since there is no ambiguity in the language of the Broad Order there is no need to modify it as the Union has ingeniously suggested. Notwithstanding the above, the evidence clearly showed that employees read the Broad Order before the beginning of the strike, and, as a result, the

[15] Union's Exception VI.
[16] Note that the Union gain notice of the Coca Cola strike on October 20, the day the strike commenced.

Union's fears were unfounded.[17] Moreover, it is to the Board and the Courts to decide whether the Broad Order has been violated and not to the Union.[18]

However, this case is not about whether the Union could or could not discipline its members, or about the applicability of the Broad Order. This case is about the unlawful motivations of the Union when allegedly enforcing its By-laws and Constitution depriving its members from their Section 7 rights.

h. Union's Failure to Notify Members of its Opposition to the Strike

In Union Boiler Company, 245 NLRB 719 (1979), 37 employees represented by a local Boilermakers' union chose to refuse to cross a picket line established at a construction gate, aligning themselves with the employees represented by the Steelworks union in their labor dispute with their employer, thus engaging in a sympathy strike. While the Scofield test was not relied upon in this case, the facts of the case have some resemblance to the case at hand. Prior to the strike, in a meeting held by the local Boilermakers union business agent at the jobsite, employees were informed by a union business agent that the union wanted them to cross the Steelworkers picket line. Boilermakers union employees that worked at the picket site were not informed by the union that they could be discharged by their employer and were affirmatively told that if they refused to cross the Steelworkers' picket line, they would not be fined.

Subsequently, in a meeting held by the union outside of the jobsite, the Boilermakers' union passed a resolution that the Boilermakers were going to man the job should the Steelworkers strike reappeared. During this meeting, only five Boilermaker

[17] Although, the Union alleges that the ALJ suggested that Magriz, Quiara and Rivera, were present when the Broad Order was read, the Union is speculating and mischaracterizing the ALJD. (Exception V)
[18] Exception IV.

employees who worked at the jobsite participated. No union official attempted to inform the other Boilermaker employees who worked at the jobsite of the union's approval of the resolution. Since the union business agent expected that the Boilermaker employees that worked at the site would disobey the resolution and not cross the picket line, it called other Boilermakers who had never worked at the jobsite to man the job. On the day of the strike, only eight Boilermakers who were employed at the site, crossed the picket line with 60 other Boilermakers who had never worked at that jobsite. The local union's business agent then requested the employer to discharge all Boilermaker employees who had not crossed the picket line. The employer acceded to the union's request and prepared the discharge notices. Prior to sending the discharge notices, the union's international representative, after finding out of the local's demand, requested that the employer rescind the business agent's action. The employer then decided to terminate the Boilermaker employees who refused to cross the picket line based on excessive absenteeism.

In addition, the local union penalized the employees by not referring them to any job from the local's out-of-work list (benching procedure) for a period of 15 days pursuant to an exclusive hiring hall between the employer and the local. The agreement provided for such penalties for involvement in any unauthorized strike, failure to return to work when instructed by agents of the local or international, or insistence in recognizing illegal or unauthorized picket lines.

The Administrative Law Judge, as affirmed by the Board, found that when the discharged employees refused to cross the picket line established at the jobsite, they aligned themselves with the employees represented by the Steelworkers in their labor

dispute with their employer. As a result, they engaged in an activity protected by the Act. The ALJ noted that the sympathy strike conducted by the employees "was conducted in opposition to the wishes of the [r]espondent [u]nions and in sense was a strike not authorized, condoned, or otherwise ratified 'by the [u]nion'". Id, supra, at 727. Notwithstanding, the ALJ also stated that the last communication that employees heard from any officer of the local before the picketing was that they would not have intra-union charges brought against them if they refused to cross the Steelworkers picket line.

The ALJ held that in the absence of any effective waiver of the employees' right to engage in sympathy strikes, discharges for engaging in such activity violated the Act. Although the ALJ did not discuss in detail his analysis regarding the intra-union discipline imposed on the employees discharged for engaging in a sympathy strike, as a remedy, he found the employer jointly and severally liable with the union for any loss of pay the employees incurred in as a result of the imposition by the union of the 15-day penalty. Clearly, by this finding, the ALJ found that the union's discipline was unlawful. The court found that the union's actions, as a whole, unlawfully encouraged loyalty to and membership in its organization. Union Boiler Company, supra, at 728.

The Union here may argue that it has a legitimate interest, as the exclusive bargaining representative of the employees, in speaking with one voice and in not seeing its strength dissipated and its stature denigrated by subgroups separately pursuing what they see as separate interests, and therefore was privileged to discipline its members for participating in the strike. But the case law is to the effect that whereas dissident conduct is more nearly in support of the things which the union is trying to accomplish, it will be protected. In this case, the strikers and supporters did not lose the protection of

the Act under the Emporium Capwell[19] principles because the employees were not acting in opposition to any established Union bargaining position or in derogation of the Union. Even when the Union has manifested that it did not authorize the strike (although there is no evidence of Union notification to employees to that effect), and such action could have arguably deprived employees of the Act's protection under Energy Coal Partnership, 269 NLRB 770 (1984), any manifestation of the Union in this case was not unlike the situation in Energy Coal Partnership,[20] vehement or persistent. See also Northeast Beverage Corp., 349 NLRB 1166 (2007), review denied in part, enforced in part 554 F.3d 133.

It is clear that at the time of the strike at Coca Cola, there was no contract in effect between Respondent Employer and the Union, thus the employees' conduct was not in violation of any contractual provision. Also, the evidence shows that the majority of employees were in accord to strike to protest the unlawful discharge of the shop stewards and to put pressure on Respondent Employer to return to the bargaining table. In this case, there is no evidence that employees were aware of the Union's decision not to support the strike or to declare it an unauthorized strike. Further, the evidence shows that the Union failed to attempt to end the strike or in good faith endeavor to secure a return of the strikers to work, or to inform its members of its decision and of the potential for disciplinary actions against union members for participating in the strike. Indeed, there was no affirmative action on the part of the Union during the almost three days that the strike lasted to make its opposition to the strike known. In this regard, since the Union's

[19] 420 U.S. 50, 95 S. Ct. 977, 43 L. Ed. 2d 12 (1975).

[20] In this case, a minority group of nine employees went on strike against the Employer because they perceived there was a lack of progress in the initial negotiations. Here, the Union was strongly opposed to a strike and so informed the dissidents both before and after their strike vote. The Union subsequently made persistent, although unsuccessful, attempts to persuade the strikers to quit the picket line.

Secretary Treasurer German Vazquez had solicited and obtained from the Coca Cola employees, unanimously, a strike vote, it is submitted that the Union had an obligation to notify Union members of its decision not to continue to support a strike at Coca Cola. Thus, absent such notification, employees were entitled to rely on the earlier Union assurances to back a strike.

i. Lack of Subject Matter Jurisdiction[21]

Respondent Union alleged that the Board lacks subject matter jurisdiction over this controversy because no term and condition of employment of the charging parties had been affected. As discussed above, CGC notes that the Union stipulated that Magriz, Quiara and Rivera's seniority rights were affected by the disciplinary action imposed upon them. (GC Ex. 35, item 52)

In Sandia National Laboratories, supra, the Board held that Section 8(b)(1)(A) is inapplicable to purely intra-union disputes if the employment relationship between the employee and the Employer is unaffected and the imposition of intra-union discipline does not contravenes a policy of the NLRA. In this case, the Union cannot argue that there was no term and/or condition of employment affected since it was stipulated that Magriz, Quiara and Rivera's seniority rights were affected. Further, it is the CGC's position that Magriz, Quiara and Rivera were engaged in activity for mutual aid or protection, activities protected under the Act, when participating in the Coca Cola meeting and strike and therefore, the discipline imposed contravenes a fundamental policy of the NLRA, when there is no legitimate Union interest that needs to be weighed.

[21] Exception I.

j. Remedy[22]

The Board has long held that it is consistent with the purposes of the Act to expunge the actual consequences of the unfair labor practice. See Republic Steel Corp. v. NLRB, 311 U.S. 7, 11-12 (1940). Since it is clear, in this case, that the Union disparately disciplined Magriz, Quiara and Rivera, CGC seeks that the Board order the Union to expunge from their files any reference to the unlawful disciplinary actions and to order the Union to return to the *status quo ante*, as they existed before March 10, 2009. See e.g. N.C. Prisoner Legal Servs., 351 N.L.R.B. 464, (2007), where the ALJ, to remedy a violation, ordered the Respondent to restore its short-term disability benefits as they had existed before the change. However, the Board found that the judge's remedy was not tailored to expunge the effects of the violation. As a result, the Board ordered the Respondent to make employees whole for any losses suffered as a result of the plan termination--i.e., to make whole any employees who would have been entitled to short-term disability benefits during the period between the unlawful termination of the Respondent's former plan and the lawful institution of the new plan. Furthermore, it should be noted that it is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." Pergament United Sales, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); and Enloe Med. Ctr., 348 N.L.R.B. 991, 2006.

In this regard, the Union's contention that the sanction of the removal as shop stewards is out of the Boards consideration is without merit. In this regard, it should be noted that all three sanctions are not independent; they were all consequences of the same

[22] Exceptions X, XI.

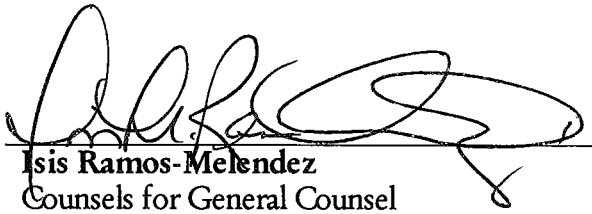
unlawful action or conduct from the Union. Moreover, the disciplinary action imposed upon Magriz, Quiara, and Rivera on March 10, 2009, which includes the fine, expulsion from membership and removal from the shop steward position, were fully litigated as a whole since the beginning of the hearing, because they were intimately related or integrated. As a result, it is submitted that if the disciplinary actions imposed upon Magriz, Quiara and Rivera, on March 10, 2009, were to be found unlawful, then, the Union must rescind the same in their totality, and not partially, as it urges.

III. CONCLUSION

Accordingly, CGC respectfully requests that the Honorable Board affirms the ALJ's findings and conclusions with respect to the CB portion of the case, against the Union. Specifically, CGC requests that the Union be order to rescind the fines levied against Magriz, Quiara, and Rivera, to reinstate them to full membership in the Respondent Union, including their shop steward position, as well as any other remedy deemed appropriate by the Board.

Dated at San Juan, Puerto Rico this 19th day of July 2010.

Ana Beatriz Ramos-Fernández



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CERTIFICATE OF SERVICE

I hereby certify that on this same date a true copy of the "COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT UNION'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION" has been served on the following parties via Electronic Mail:

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